CALIFORNIA OFFICE OF ADMINISTRATIVE LAW

SACRAMENTO, CALIFORNIA

In re: Request for Regulatory Determination filed by Marcos R. Juarez, concerning the Department of Corrections' rule banning the possession of another inmate's legal materials while being processed through work exchange[1]	1990 OAL Determination No. 8 [Docket No. 89-014] April 12, 1990 Determination Pursuant to Government Code Section 11347.5; Title 1, California Code of Regulations, Chapter 1, Article 2

Determination by:

JOHN D. SMITH, Chief Counsel

Herbert F. Bolz, Coordinating Attorney
Debra M. Cornez, Staff Counsel
Rulemaking and Regulatory
Determinations Unit

SYNOPSIS

The issue presented to the Office of Administrative Law is whether or not a rule written and issued by the superintendent of one particular state prison of the Department of Corrections, banning the possession of legal materials belonging to another inmate under certain circumstances, is a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

Though expressing no opinion as to whether this local rule is in accord with other applicable law, the Office of Administrative Law has concluded that this local rule is not a "regulation" required to be adopted in compliance with the Administrative Procedure Act.

THE ISSUE PRESENTED [2]

The Office of Administrative Law ("OAL") has been requested to determine[3] whether or not a local rule written and issued in a memorandum by the superintendent of a state prison under the control of the Department of Corrections ("Department"), banning the possession of legal materials belonging to another inmate when being processed through work exchange, is a "regulation" required to be adopted pursuant to the Administrative Procedure Act ("APA").

THE DECISION [4,5,6,7,8]

OAL finds that:

(1) the Department's rules are generally required to be adopted pursuant to the APA;

(2) the challenged local rule is not a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);

(3) the local rule does not violate Government Code section 11347.5, subdivision (a).[9]

REASONS FOR DECISION

I. AGENCY; AUTHORITY; BACKGROUND

Agency

California's first, and for many years only, prison was located at San Quentin on San Francisco Bay. As the decades passed, additional institutions were established, leading to an increased need for uniform statewide rules. Ending a long period of decentralized prison administration, the Legislature created the California Department of Corrections in 1944.[10] The Legislature has entrusted the Director of Corrections with a "difficult and sensitive job,"[11] namely:

> "[t]he supervision, management and control of the State prisons, and the responsibility for the care, custody, treatment, training, discipline and employment of persons confined therein . . . ."[12]

Authority [13]

Penal Code section 5058, subdivision (a), provides in part:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. . . ." [Emphasis added.]

General Background: The Department's Three Tier Regulatory Scheme

The Department of Corrections was traditionally considered exempt from codifying any of its rules and regulations in the California Code of Regulations. Dramatic changes to this policy have occurred in the past 15 years, in part reflecting a broader trend in which legislative bodies have addressed "deep seated problems of agency accountability and responsiveness"[14] by generally requiring administrative agencies to follow certain procedures, notably public notice and hearing, prior to adopting administrative regulations.

"The procedural requirements of the APA," the California Court of Appeal has pointed out, "are designed to promote fulfillment of its dual objectives--meaningful public participation and effective judicial review."[15] Some legislatively mandated requirements reflect a concern that regulatory enactments be supported by a complete rulemaking record, and thus be more likely to withstand judicial scrutiny.[16]

The Department has for many years used a three-tier regulatory scheme to carry out its duties under the California Penal Code. The first tier consists of the "Director's Rules," a relatively brief collection of statewide "general principles," which were adopted pursuant to the APA and are currently contained in about 225 CCR pages. The Director's Rules were placed in the CCR in response to a 1976 legislative mandate which explicitly directed the Department to adopt its rules as regulations pursuant to the APA.

For many years, the second tier consisted of the "family of manuals," a group of six "procedural" manuals containing additional statewide rules supplementing the Director's Rules.[17] The manuals are the Classification Manual, the Departmental Administrative Manual, the Business Administration Manual, the Narcotic Outpatient Program Manual, the Parole Procedures Manual-Felon, and the Case Records Manual. The Department is currently in the process of reviewing all existing procedural manuals and operations plans, with the objective of transferring all regulatory material from manuals into the CCR, and combining all six existing manuals into a single more concise "CDC Operations Manual." So far, Volumes II, VI, VII, and VIII of the new CDC Operations Manual have been issued.

Manuals are updated by "Administrative Bulletins," which often include replacement pages for modified manual provisions. Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, Division 3, Title 15 of the CCR states in part:

> "Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures."

Court decisions have struck down portions of the second tier--the Classification Manual[18] and parts of the Administrative Manual[19] (and unincorporated "Administrative Bulletins"[20])--for failure to comply with APA requirements.[21] OAL regulatory determinations have found the Classification Manual,[22] several portions of the Administrative Manual,[23] and several portions of the Case Records Manual[24] to violate Government Code section 11347.5.[25]

The third tier of the regulatory scheme consists of hundreds (perhaps thousands) of "operations plans," drafted by individual wardens and superintendents and approved by the Director.[26] These plans often repeat parts of statutes,

Director's Rules (i.e., codified regulations), and procedural manuals.[27]

Also included in this third tier are local rules written and issued by individual wardens and superintendents to be applied to their particular correctional facility. Such a rule is at issue in the matter before us.

Background: Legislative and Judicial Actions

In the 1970's, efforts were made to require the Department to follow APA procedures in adopting its regulations. The first effort to attain this goal through the legislative process passed the Assembly in 1971, but failed to obtain the approval of the Senate Finance Committee.[28] A two-pronged effort followed. Another bill was introduced;[29] the Sacramento Superior Court was asked to order the Department to follow APA procedures. Both efforts initially succeeded. The court ordered the Department to comply with the APA; both houses of the Legislature passed the bill. However, while the bill was on Governor Reagan's desk in 1973, the California Court of Appeal overturned the trial court decision.[30] Shortly after the appellate decision, the Governor vetoed the bill.

In 1975, a third bill[31] passed the Legislature and was approved by Governor Brown.[32] In passing this third bill, the Legislature set a deadline for the Department to place its regulations in the APA:

> "It is the intent of the Legislature that any rules and regulations adopted by the Department of Corrections . . . prior to the effective date of this act [January 1, 1976], shall be reconsidered pursuant to the provisions of the Administrative Procedure Act before July 1, 1976." [Emphasis added.][33]

Prior to the July 1, 1976 deadline, the Department adopted the Director's Rules, the first tier of the regulatory scheme, into the CCR.

Did the Legislature intend, however, that third tier materials, operations plans or local rules issued by particular wardens or superintendents to be applied to particular institutions, be generally subject to APA procedures? We conclude that the answer to this question is "no." In reaching this conclusion, we rely primarily on two factors: (1) the long-established legal line of demarcation between "the rules or regulations of the Department" and rules applying only to one particular institution and (2) the absurd consequences of deeming the APA to apply to local rules.

(1) Line of demarcation between statewide and institutional rules.

California courts have long distinguished between statewide rules and rules applying solely to one prison.[34] In American Friends Service Committee v. Procunier,[35] the case which overturned a trial court order directing the Department to adopt its "rules and regulations" pursuant to the APA, the California Court of Appeal stated:

> "The rules and regulations of the Department are promulgated by the Director and are distinguished from the institutional rules enacted by each warden of the particular institution affected." [Emphasis added.][36]

Procunier is especially significant because it was this case which the Legislature in essence overturned by adopting the 1975 amendment to Penal Code section 5058 which made the Department subject to the APA. The controversy was over whether or not the Director's Rules, the rules "promulgated by the Director" (emphasis added) were subject to APA requirements.

This dichotomy between institutional and statewide rules continues to be reflected in more recent cases, such as Hillery v. Enomoto (1983). The Hillery court, though forcefully rejecting arguments that Chapter 4600 of the Administrative Manual did not violate the APA, carefully noted:

> "This case does not present the question whether the director may under certain circumstances delegate to the wardens and superintendents of individual institutions the power to devise particular rules applicable solely to those institutions. Nor does it present the question whether the wardens and superintendents may promulgate such rules without complying with the APA. Although some institutions were exempted from certain provisions of the guidelines involved here, the guidelines at issue were (1) adopted by the Director of the Department of Corrections and (2) are of general applicability." [Emphasis added.][37]

(2) Absurd Consequences

Requiring third tier ("local") rules to be adopted pursuant to the APA would have absurd consequences. Wardens would have to go through the public notice and comment process prior to, for instance, establishing or modifying rules setting hours during which meals are served! While, as noted in prior Determinations,[38] departmental decisions on statewide matters often have major fiscal and policy consequences, local administrative decisions are, for the most part,[39] much less significant. Requiring full-bore APA

procedures for these myriad decisions would seriously undercut the individual warden's ability to carry out his or her legal duties. Requiring the Department to adopt statewide rules pursuant to the APA was a controversial legislative policy decision, from which many legislators dissented. Had the members been informed that local rules would also be subject to APA adoption requirements, it is likely the bill would not have passed.

Background: This Determination

In 1969, the U.S. Supreme Court ruled in Johnson v. Avery[40] that a state prison regulation barring inmates from assisting other inmates in preparation of legal documents was invalid because it conflicted with the federal right of habeas corpus. This ruling came about despite the state's claim that the rule was necessary to maintain prison discipline. The court found that the state had not provided other alternatives for providing legal assistance to the inmates.[41]

When Johnson was decided, a rule (Rule D 2602) issued by the Director of the Department of Corrections specifically prohibited mutual legal assistance among inmates.[42] In an effort to comply with the constitutional requirements set forth in Johnson, the Director revised Rule D 2602 to allow one inmate to assist another inmate in the preparation of legal documents. Revised Rule D 2602 further stated "All briefs, petitions and other legal papers must be and remain in the possession of the inmate to whom they pertain." This portion of the revised Rule D 2602 was struck down in 1970 by the California Supreme Court, in In re Harrell,[43] as constituting "an unreasonable restriction upon the right of access to the courts and is invalid."[44] In 1976, when the Department incorporated the Rules of the Director into the CCR, Rule D 2602 became Title 15, CCR, section 3163.[45] At that time section 3163 stated that ". . . Legal papers, books, opinions and forms being used by one inmate to assist another may be in the possession of the inmate giving assistance with the permission of the owner. . . ." (Emphasis added.) Currently, section 3163 states that these legal materials "may be in the possession of either inmate with the permission of the owner. . . ." (Emphasis added.)

In a more recent case, Sands v. Lewis[46] (1989), the Ninth Circuit Court of Appeals reiterated the findings of the U.S. Supreme Court in Bounds v. Smith:[47]

> "In Bounds, the Court surveyed its decisions in this area, observing that its most recent cases had 'struck down restrictions and required remedial measures to insure that inmate access to the courts is adequate, effective, and meaningful.' [Citation omitted] (emphasis added); [Citations omitted]."[48,49]

On August 23, 1990, Marcos R. Juarez, submitted to OAL a Request for Determination challenging a rule contained in a memorandum issued by A. A. Gomez, Superintendent of Avenal State Prison. The memorandum, dated July 28, 1988, addressed to "ALL CONCERNED," titled "PROCESSING OF INMATES TO AND FROM THE LAW LIBRARY THROUGH WORK EXCHANGE," stated:

> "An inmate enroute to or from the Law Library with a ducat and under escort, may take his own legal papers through work exchange. Per Director's Rule, Title 15, Section 3163, inmates may assist other inmates in preparing legal work and may have legal papers belonging to another inmate in his possession (with permission of the other inmate). However, when being processed through work exchange, each inmate must bring only his own legal material through. This allows the work exchange officers to complete their cursory examination speedily and efficiently without precluding legitimate legal work from being conducted." [Emphasis in original.]

At the time this Request was submitted, Mr. Juarez was an inmate at Avenal State Prison. In his Request, Mr. Juarez claims that the prison's program administrator and superintendent

> "have completely emasculated Title 15, [CCR,] section 3163, and have denied this inmate access to the courts and disallowed any assistance to other inmate[s] due to the insertion made my [sic] Mr. A. A. Gomez[.] The California and United States Supreme Courts have abolished the antiquated Director's Rule, D-2602, in order to permit mutual prisoner assistance. The present conditions at Avenal State Prison are impeding access to the courts to uneducated and non-English speaking inmates. In my efforts to obtain this constitutionla [sic] right for others, I have been targeted for threats and harassments by [the program administrator], whereby, said inmate is not permitted to carry any of my personal legal resource material to wrok, [sic] and as of July 28, 1989, ALL personal legal resource material was confiscated from this inmate and kept in an unsecure room, completely contrary to rules and regulations manifested for the protection of 'Jail-house Lawyers' attempting to assist others in their endeavors to challenge court committments [sic] and/or Administrative improprieties; not to mention violations of constitutional rights."

On January 19, 1990, OAL published a summary of this Request for Determination in the California Regulatory Notice Register,[50] along with a notice inviting public comment.

On March 1, 1990, OAL received the Department's Response to the Request for Determination. The Department argues that the memorandum

> "repeats a formal regulation [Tit. 15, CCR, sec. 3163], in part, is merely a statement of intention or purpose, in part, and the remainder is a 'local rule.'. . ."

Title 15, CCR, section 3163 provides in part:

> "One inmate may assist another in the preparation of legal documents, but shall not receive any form of compensation from the inmate assisted. Legal papers, books, opinions and forms being used by one inmate to assist another may be in the possession of either inmate with the permission of the owner. . . ."

We agree with the Department that the second sentence of the challenged memorandum merely restates section 3163. We also agree that the last sentence of the memorandum merely states the reason for or explanation of the challenged memorandum.[51] Therefore, the second and fourth sentences of the challenged memorandum are nonregulatory.

The first and third sentence of the memorandum, when read together, provide that an inmate going to and from the law library may possess only his own legal materials, and not those of another inmate, when being processed through work exchange.[52] We therefore will continue our analysis of this rule only.

II. ISSUES

There are three main issues before us:[53]

(1) WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

(2) WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

(3) WHETHER THE CHALLENGED RULE FALLS WITHIN ANY ESTABLISHED GENERAL EXCEPTION TO APA REQUIREMENTS.

FIRST, WE INQUIRE WHETHER THE APA IS GENERALLY APPLICABLE TO THE DEPARTMENT'S QUASI-LEGISLATIVE ENACTMENTS.

The APA generally applies to <u>all</u> state agencies, except those in the "judicial or legislative departments."[54] Since the Department is in neither the judicial nor legislative branch of state government, we conclude that APA rulemaking requirements generally apply to the Department.[55]

In addition, Penal Code section 5058, subdivision (a), provides in part:

> "The director [of the Department of Corrections] may prescribe and amend rules and regulations for the administration of the prisons. The rules and regulations shall be promulgated and filed pursuant to [the APA] . . . ." [Emphasis added.]

We are aware of no specific statutory exemption which would permit the Department to conduct rulemaking without complying with the APA.

SECOND, WE INQUIRE WHETHER THE CHALLENGED RULE IS A "REGULATION" WITHIN THE MEANING OF THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342.

In part, Government Code section 11342, subdivision (b), defines "regulation" as:

> ". . . every rule, regulation, order, or standard of general application or the amendment, supplement or revision of any such rule, regulation, order or standard adopted by any state agency to implement, interpret, or make specific the law enforced or administered by it, or to govern its procedure, . . ." [Emphasis added.]

Government Code section 11347.5, authorizing OAL to determine whether or not agency rules are "regulations," provides in part:

> "(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction [or] . . . standard of general application . . . has been adopted as a regulation and filed with the Secretary of State pursuant to [the APA] . . . ." [Emphasis added.]

Applying the definition of "regulation" found in the key provision Government Code section 11342, subdivision (b), involves a two-part inquiry:

> First, is the challenged rule of the state agency either
>
> o a rule or standard of general application or

- o a modification or supplement to such a rule?

Second, has the challenged rule been adopted by the agency to either

- o implement, interpret, or make specific the law enforced or administered by the agency or
- o govern the agency's procedure?

A. A Rule or Standard of General Application or a Modification or Supplement to Such a Rule?

The answer to the first part of the inquiry is "no."

The Department argues that the challenged rule was written and issued by the superintendent of Avenal State Prison, is applied only to the inmates located at Avenal State prison, and therefore the "local rule" is not a rule of general application statewide and not subject to APA requirements. We agree with the Department.

For an agency rule or standard to be "of general application" within the meaning of the APA, it need not apply to all citizens of the state. It is sufficient if the rule applies to all members of a class, kind or order.[56] In the context of rules applying to prisoners, the courts have articulated a narrower standard. The following is a discussion, quoted from 1988 OAL Determination No. 13,[57] of this "narrow standard":

> "In Stoneham v. Rushen I (1982),[58] the California Court of Appeal held that a 'comprehensive' inmate classification scheme constituted 'a rule of general application significantly affecting the male prison population in the custody of the Department [in California].' (Emphasis added.)[59],[60] Three other published opinions have followed Stoneham I.[61]
>
> "THE ISSUE IS THUS WHETHER WE SHOULD GO BEYOND THE STANDARD ARTICULATED IN STONEHAM, THAT IS, WHETHER WE SHOULD CONCLUDE THAT NOT ONLY STATEWIDE RULES ARE OF 'GENERAL' APPLICATION IN THE PRISON CONTEXT, BUT ALSO RULES PERTAINING SOLELY TO ONE INSTITUTION. For the reasons listed below, and in the absence of a clear expression of legislative intent to the contrary, we decline to go beyond what the courts have held.
>
> > (1) As noted above [under the subheading "Background: Legislative and Judicial Actions"], we conclude that the Legislature did not originally intend that rules pertaining solely to one institution be adopted pursuant to the APA.

(2) Requiring the rules to be formally adopted would not only trivialize the APA rulemaking process, but would also needlessly complicate the already difficult task of prison administration.[62] Flexibility is needed at the institutional level to deal with matters such as sudden population increases.[63]

(3) A duly adopted regulation, Title 15, CCR, section 3190, specifically authorizes wardens to adopt institutional rules. The requirement that institutional rules must be reviewed by the Director provides some degree of protection against undesirable local rules.

(4) Inmates who object to the content of particular institutional rules may file grievances within the prison system, and if relief is not forthcoming there, may easily (and without obtaining legal representation) petition for habeas corpus relief in superior court. These simple, no-cost procedures stand in sharp contrast to the complexity and expense faced by a wage earner, small businessperson, school district, etc., when the decision is made to litigate a troublesome informal rule. There is thus, in the [specific] prison context, less need for imposing stringent public notice and comment requirements. An inmate would likely have a small chance of success in filing a grievance against a statewide rule. Since local rules are subject to review by the Director, however, it is possible that a grievance directed at a local rule might be granted upon review by the Director.

(5) Most critical prison rules are statewide in nature and thus subject to APA requirements. Courts will require individual institutions to conform to duly adopted statewide rules, thus protecting affected parties from inconsistent local rules.[64]

(6) California prisons have recently experienced a substantial increase in the inmate population. Many new staff members have been hired to deal with the inmate influx. Thus, individual prisons are in particular need at this time of rules that inform both inmates and staff how recurring problems are to resolved."[65],[66] [Original emphasis.]

Further, in its Response,[67] the Department explains the physical setup of Avenal State Prison and why the challenged

rule is not a rule of general application, but is unique to Avenal:

> "This Memorandum covers a restriction by Avenal of the areas in which one inmate may possess legal material belonging to another. Avenal is divided into six distinct inmate housing/working units which are each surrounded by their own security perimeter. In limited situations, e.g. law library access, an inmate with permission ('ducat' and staff escort) may go from one unit to another. [Par.] In many other institutions, each unit has its own law library, therefore a rule governing inter unit travel in order to gain law library access is not needed. . . ."

Thus, we agree with the Department that the challenged rule is not a standard of general application. We would, however, have serious concerns if the local rule (or its equivalent) were applied statewide.

WE THEREFORE CONCLUDE THAT THE CHALLENGED RULE IS NOT A "REGULATION" AS DEFINED IN THE KEY PROVISION OF GOVERNMENT CODE SECTION 11342, SUBDIVISION (b), AND THUS IS NOT SUBJECT TO THE REQUIREMENTS OF THE APA.

In light of this conclusion, it is not necessary for us to discuss whether the challenged rule falls within any established exception to APA requirements.

Finally, it should be noted that we do not reach the question of whether or not the rule is consistent with Title 15, CCR, section 3163.

III. CONCLUSION

For the reasons set forth above, OAL finds that:

(1) the Department's rules are generally required to be adopted pursuant to the APA;

(2) the challenged local rule is not a "regulation" as defined in the key provision of Government Code section 11342, subdivision (b);

(3) the local rule does not violate Government Code section 11347.5, subdivision (a).

DATE: April 12, 1990

HERBERT F. BOLZ
Coordinating Attorney

DEBRA M. CORNEZ
Staff Counsel

Rulemaking and Regulatory
Determinations Unit[68]
Office of Administrative Law
555 Capitol Mall, Suite 1290
Sacramento, California 95814
(916) 323-6225, ATSS 8-473-6225
Telecopier No. (916) 323-6826

1. This Request for Determination was filed by Marcos R. Juarez, at the time the Request was submitted, an inmate at Avenal State Prison. The Department of Corrections was represented by Jerold A. Prod, Deputy Director, and Marc D. Remis, Staff Counsel, Legal Affairs Division, P. O. Box 942883, Sacramento, CA 94283-0001, (916) 445-0495.

   To facilitate the indexing and compilation of determinations, OAL began, as of January 1, 1989, assigning consecutive page numbers to all determinations issued within each calendar year, e.g., the first page of this determination, as filed with the Secretary of State and as distributed in typewritten format by OAL, is "203" rather than "1." Different page numbers are necessarily assigned when each determination is later published in the California Regulatory Notice Register.

2. The legal background of the regulatory determination process --including a survey of governing case law--is discussed at length in note 2 to 1986 OAL Determination No. 1 (Board of Chiropractic Examiners, April 9, 1986, Docket No. 85-001), California Administrative Notice Register 86, No. 16-Z, April 18, 1986, pp. B-14--B-16; typewritten version, notes pp. 1-4.

   In August 1989, a second survey of governing case law was published in 1989 OAL Determination No. 13 (Department of Rehabilitation, August 30, 1989, Docket No. 88-019), California Regulatory Notice Register 89, No. 37-Z, p. 2833, note 2. The second survey included (1) five cases decided after April 1986 and (2) seven pre-1986 cases discovered by OAL after April 1986. Persuasive authority was also provided in the form of nine opinions of the California Attorney General which addressed the question of whether certain material was subject to APA rulemaking requirements.

   Since August 1989, the following authorities have come to light:

   > (1) Los Angeles v. Los Olivas Mobile Home P. (1989) 213 Cal.App.3d 1427, 262 Cal.Rptr. 446, 449 (the Second District Court of Appeal -- citing Jones v. Tracy School District (1980) 27 Cal.3d 99, 165 Cal.Rptr. 100 (a case in which an internal memorandum of the Department of Industrial Relations became involved) -- refused to defer to the administrative interpretation of a rent stabilization ordinance by the city agency charged with its enforcement because the interpretation occurred in an internal memorandum rather than in an administrative regulation adopted after notice and hearing).

(2) Compare Developmental Disabilities Program, 64 Ops.Cal.Atty.Gen. 910 (1981) (Pre-11347.5 opinion found that Department of Developmental Services' "guidelines" to regional centers concerning the expenditure of their funds need not be adopted pursuant to the APA if viewed as nonmandatory administrative "suggestions") with Association of Retarded Citizens v. Department of Developmental Services (1985) 38 Cal.3d 384, 211 Cal.Rptr. 758 (court avoided the issue of whether DDS spending directives were underground regulations, deciding instead that the directives were not authorized by the Lanterman Act, were inconsistent with the Act, and were therefore void).

(3) California Coastal Commission v. Office of Administrative Law (1989) 210 Cal.App.3d 758, 258 Cal.Rptr. 560 (relying on a footnote in a 1980 California Supreme Court opinion, First District Court of Appeal, Division One, set aside 1986 OAL Determination No. 2 (California Coastal Commission, Docket No. 85-003) on grounds that challenged coastal development guidelines fell within scope of express statutory exception to APA requirements); reviewed denied by California Supreme Court on August 31, 1989, two justices dissenting.

(4) Grier v. Kizer (April 1990) 90 Daily Journal D.A.R. 3641 (giving "due deference" to 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016), the Second District Court of Appeal, Division Three, held that the statistical extrapolation rule used in Medi-Cal provider audits was an invalid and unenforceable underground regulation).

Readers aware of additional judicial decisions concerning "underground regulations"--published or unpublished--are invited to furnish OAL's Regulatory Determinations Unit with a citation to the opinion and, if unpublished, a copy of the opinion. (Whenever a case is cited in a regulatory determination, the citation is reflected in the Determinations Index.) Readers are also encouraged to submit citations to Attorney General opinions addressing APA compliance issues.

3. Title 1, California Code of Regulations ("CCR") (formerly known as the "California Administrative Code"), section 121, subsection (a), provides:

> "'Determination' means a finding by [OAL] as to whether a state agency rule is a [']regulation,['] as defined in Government Code section 11342, subdivision (b), which is invalid and unenforceable unless it has been adopted as a regulation and filed with the Secretary of State in accordance with the

> [APA] or unless it has been exempted by statute from the requirements of the [APA]." [Emphasis added.]

See Planned Parenthood Affiliates of California v. Swoap (1985) 173 Cal.App.3d 1187, 1195, n. 11, 219 Cal.Rptr. 664, 673, n. 11 (citing Gov. Code sec. 11347.5 in support of finding that uncodified agency rule which constituted a "regulation" under Gov. Code sec. 11342, subd. (b), yet had not been adopted pursuant to the APA, was "invalid").

4. In a recent case, the Second District Court of Appeal, Division Three, held that a Medi-Cal audit statistical extrapolation rule utilized by the Department of Health Services must be adopted pursuant to the APA. Grier v. Kizer (90 Daily Journal D.A.R. 3641, April 4, 1990). Prior to this court decision, OAL had been requested to determine whether or not this Medi-Cal audit rule met the definition of "regulation" as found in Government Code section 11342, subdivision (b), and therefore was required to be adopted pursuant to the APA. Pursuant to Government Code section 11347.5, OAL issued a determination concluding that the audit rule did meet the definition of "regulation," and therefore was subject to APA requirements. 1987 OAL Determination No. 10 (Department of Health Services, Docket No. 86-016, August 6, 1987). The Grier court concurred with OAL's conclusion.

The Grier court stated that the

> "Review of [the trial court's] decision is a question of law for this court's independent determination, namely, whether the Department's use of an audit method based on probability sampling and statistical extrapolation constitutes a regulation within the meaning of section 11342, subdivision (b). [Citations.]" 90 Daily Journal D.A.R. at p. 3643.

In regards to the treatment of 1987 OAL Determination No. 10, which was submitted to the court for consideration in the case, the court further found

> "While the issue ultimately is one of law for this court, 'the contemporaneous administrative construction of a statute by those charged with its enforcement and interpretation is entitled to great weight, and courts generally will not depart from such construction unless it is clearly erroneous or unauthorized. [Citations.]' [Citations.] [Par.] Because [Government Code] section 11347.5, subdivision (b), charges the OAL with interpreting whether an agency rule is a regulation as defined in [Government Code] section 11342, subdivision (b), we accord its determination due consideration." (Id.; emphasis added.)

The court also ruled that OAL's Determination, that "the audit technique had not been duly adopted as a regulation pursuant to the APA, . . . [and therefore] deemed it to be an invalid and unenforceable 'underground' regulation," was "entitled to due deference." (Emphasis added.)

Other reasons for according "due deference" to OAL determinations are discussed in note 5 of 1990 OAL Determination No. 4 (Board of Registration for Professional Engineers and Land Surveyors, February 14, 1990, Docket No. 89-010), California Regulatory Notice Register 90, No. 10-Z, March 9, 1990, p. 384.

5. Note Concerning Comments and Responses

In general, in order to obtain full presentation of contrasting viewpoints, we encourage not only affected rulemaking agencies but also all interested parties to submit written comments on pending requests for regulatory determination. (See Title 1, CCR, sections 124 and 125.) The comment submitted by the affected agency is referred to as the "Response." If the affected agency concludes that part or all of the challenged rule is in fact an "underground regulation," it would be helpful, if circumstances permit, for the agency to concede that point and to permit OAL to devote its resources to analysis of truly contested issues.

No public comments were submitted in this proceeding.

The Department of Correction's Response to the Request for Determination was received by OAL on March 1, 1990 and was considered in this proceeding.

6. If an uncodified agency rule is found to violate Government Code section 11347.5, subdivision (a), the rule in question may be validated by formal adoption "as a regulation" (Government Code section 11347.5, subd. (b)) or by incorporation in a statutory or constitutional provision. See also California Coastal Commission v. Quanta Investment Corporation (1980) 113 Cal.App.3d 579, 170 Cal.Rptr. 263 (appellate court authoritatively construed statute, validating challenged agency interpretation of statute.)

7. Pursuant to Title 1, CCR, section 127, this Determination shall become effective on the 30th day after filing with the Secretary of State. This Determination was filed with the Secretary of State on the date shown on the first page of this Determination.

8. We refer to the portion of the APA which concerns rulemaking by state agencies: Chapter 3.5 of Part 1 ("Office of Administrative Law") of Division 3 of Title 2 of the Government Code, sections 11340 through 11356.

The rulemaking portion of the APA and all OAL Title 1 regulations are both reprinted and indexed in the annual APA/OAL regulations booklet, which is available from OAL's Information Services Unit for $3.00.

9. Government Code section 11347.5 provides:

"(a) No state agency shall issue, utilize, enforce, or attempt to enforce any guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, which is a ['']regulation['] as defined in subdivision (b) of Section 11342, unless the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule has been adopted as a regulation and filed with the Secretary of State pursuant to this chapter.

"(b) If the office is notified of, or on its own, learns of the issuance, enforcement of, or use of, an agency guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which has not been adopted as a regulation and filed with the Secretary of State pursuant to this chapter, the office may issue a determination as to whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule, is a ['']regulation['] as defined in subdivision (b) of Section 11342.

"(c) The office shall do all of the following:

1. File its determination upon issuance with the Secretary of State.

2. Make its determination known to the agency, the Governor, and the Legislature.

3. Publish a summary of its determination in the California Regulatory Notice Register within 15 days of the date of issuance.

4. Make its determination available to the public and the courts.

"(d) Any interested person may obtain judicial review of a given determination by filing a written petition requesting that the determination of the office be modified or set aside. A petition shall be filed with the court within 30 days of the date the determination is published.

"(e) A determination issued by the office pursuant to this section shall not be considered by a court, or by an administrative agency in an adjudicatory proceeding if all of the following occurs:

1. The court or administrative agency proceeding involves the party that sought the determination from the office.

2. The proceeding began prior to the party's request for the office's determination.

3. At issue in the proceeding is the question of whether the guideline, criterion, bulletin, manual, instruction, order, standard of general application, or other rule which is the legal basis for the adjudicatory action is a [']regulation['] as defined in subdivision (b) of Section 11342."

[Emphasis added.]

10. Penal Code section 5000.

11. Enomoto v. Brown (1981) 117 Cal.App.3d 408, 414, 172 Cal.Rptr. 778, 781.

12. Penal Code section 5054.

13. We discuss the affected agency's rulemaking authority (see Gov. Code, sec. 11349, subd. (b)) in the context of reviewing a Request for Determination for the purposes of exploring the context of the dispute and of attempting to ascertain whether or not the agency's rulemaking statute expressly requires APA compliance. If the affected agency should later elect to submit for OAL review a regulation proposed for inclusion in

the California Code of Regulations, OAL will, pursuant to Government Code section 11349.1, subdivision (a), review the proposed regulation in light of the APA's procedural and substantive requirements.
The APA requires all proposed regulations to meet the six substantive standards of Necessity, Authority, Clarity, Consistency, Reference, and Nonduplication. OAL does not review alleged "underground regulations" to determine whether or not they meet the six substantive standards applicable to regulations proposed for formal adoption.

The question of whether the challenged rule would pass muster under the six substantive standards need not be decided until such a regulatory filing is submitted to us under Government Code section 11349.1, subdivision (a). At that time, the filing will be carefully reviewed to ensure that it fully complies with all applicable legal requirements.

Comments from the public are very helpful to us in our review of proposed regulations. We encourage any person who detects any sort of legal deficiency in a proposed regulation to file comments with the rulemaking agency during the 45-day public comment period. (Only persons who have formally requested notice of proposed regulatory actions from a specific rulemaking agency will be mailed copies of that specific agency's rulemaking notices.) Such public comments may lead the rulemaking agency to modify the proposed regulation.

If review of a duly-filed public comment leads us to conclude that a regulation submitted to OAL does not in fact satisfy an APA requirement, OAL will disapprove the regulation. (Gov. Code, sec. 11349.1.)

14. California Optometric Association v. Lackner (1976) 60 Cal.App.3d 500, 511, 131 Cal.Rptr. 744, 751.

15. Id.

16. For instance, Government Code section 11346.7, subdivision (b) requires a "final statement of reasons" for each regulatory action.

17. Manuals are intended to supplement CCR provisions. The Preface to Chapter 1, titled "Rules and Regulations of the Director of Corrections" (Title 15, Division 3, of the CCR), states in part:

> "Statements of policy contained in the rules and regulations of the director will be considered as regulations. Procedural detail necessary to

> implement the regulations is not always included in each regulation. Such detail will be found in appropriate departmental procedural manuals and in institution operational plans and procedures." [Emphasis added.]
>
> [This language first appeared in the CCR in May of 1976. (California Administrative Notice Register 76, No. 19, May 8, 1976, p. 401.) The Preface, and the quotation, were printed in the CCR in response to the legislative requirement stated in section 3 of Statutes of 1975, chapter 1160, page 2876 (the uncodified statutory language accompanying the 1976 amendment to Penal Code section 5058). As shown by the dates, this language was added to the CCR prior to the decision in Armistead v. State Personnel Board ((1978) 22 Cal.3d 198, 149 Cal.Rptr. 1) and subsequent case law, prior to the creation of OAL, and prior to the enactment of Government Code section 11347.5.]

The Departmental Administrative Manual makes clear in general that local institutions are expected to strictly adhere to the supplementary rules appearing in departmental procedural manuals, and specifically requires that local operations plans are to be consistent with the statewide procedural manuals.

According to section 102(a) of the Administrative Manual:

> "[i]t is the policy of the Director of Corrections that all institutions . . . under the jurisdiction of the Department . . . shall . . . observe and follow established departmental goals and procedures as reflected in departmental manuals . . . ." [Emphasis added.]

Section 240(c) of the Administrative Manual states:

> "While the policies and procedures contained in the procedural manuals are as mandatory as the Rules and Regulations of the Director of Corrections, the directions given in a manual shall avoid use of the words 'rule(s)' or 'regulation(s)' except to refer to the Director's Rules or the rules and regulations of another governmental agency." [Emphasis added.]

18. Stoneham v. Rushen I (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen II (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20; and Hershipps & Oldfield v. McCarthy (Super. Ct. Sacramento County, 1987, No. 350531, order issuing injunction regarding Classification Manual filed June 1, 1987.)

19. Hillery v. Rushen (9th Cir. 1983) 720 F.2d 1132; Faunce v. Denton (1985) 167 Cal.App.3d 191, 213 Cal.Rptr. 122.

20. Stoneham v. Rushen ("Stoneham I") (1982) 137 Cal.App.3d 729, 188 Cal.Rptr. 130; Stoneham v. Rushen ("Stoneham II") (1984) 156 Cal.App.3d 302, 203 Cal.Rptr. 20.

21. These adverse decisions concerning regulatory "second tier" material have not been unexpected. The author of the successful 1975 bill rejected an amendment proposed by the Department which would have specifically excluded the statewide procedural manuals from the APA adoption requirement. Later, a Youth and Adult Correctional Agency bill analysis dated May 5, 1981, unsuccessfully opposed AB 1013, the bill which resulted in the enactment of Government Code section 11347.5. This analysis contained a warning that the proposed legislation "could result in a great part of our [i.e., Department of Corrections'] procedural manuals going under the Administrative Procedure Act process . . . ."

22. 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-74.

23. 1987 OAL Determination No. 15 (Department of Corrections, November 19, 1987, Docket No. 87-004), California Administrative Notice Register 87, No. 49-Z, December 4, 1987, p. 872 (sections 7810-7817, Administrative Manual); 1988 OAL Determination No. 2 (Department of Corrections, February 23, 1988, Docket No. 87-008), California Regulatory Notice Register 88, No. 10-Z, March 4, 1988, p. 720 (chapters 2900 and 6500, section 6144, Administrative Manual); 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, p. 1682 (chapter 7300, Administrative Manual); 1989 OAL Determination No. 11 (Department of Corrections, July 25, 1989, Docket No. 88-014), California Regulatory Notice Register 89, No. 30-Z, August 11, 1989, p. 2563 (sections 510, 511 and 536-541, Administrative Manual). Portions of the above-noted chapters and sections were found not to be "regulations."

Compare with 1989 OAL Determination No. 9 (Department of Corrections, May 18, 1989, Docket No. 88-011), California Regulatory Notice Register 89, No. 22-Z, June 2, 1989, p. 1625 (section 2708, Administrative Manual -- held to be exempt from APA requirements).

24. 1988 OAL Determination No. 19 (Department of Corrections, November 18, 1988, Docket No. 87-026), California Regulatory Notice Register 88, No. 49-Z, December 2, 1988, p. 3850 (subsections 1002(b) and (c), and 1053(b) of the Case Records Manual were found to be regulatory; subsections 1002(a) and (d), and 1053(a) were found not to be regulatory). 1989 OAL Determination No. 3 (Department of Corrections, February 21, 1989, Docket No. 88-005), California Regulatory Notice Register 89, No. 9-Z, March 3, 1989, p. 556 (Chapters 100 through 1900, noninclusive, of the Case Records Manual were found to be regulatory except for those sections which were either nonregulatory or were restatements of existing statutes, regulations, or case law).

25. Other challenged rules which do not neatly fall within the Department's three-tiered regulatory scheme have also been the subject of OAL determinations. 1989 OAL Determination No. 5 (Department of Corrections, April 5, 1989, Docket No. 88-007), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, p. 1120 (memo issued by Department official held exempt from APA); 1989 OAL Determination No. 6 (Department of Corrections, April 19, 1989, Docket No. 88-008), California Regulatory Notice Register 89, No. 18-Z, May 5, 1989, p. 1293 (unwritten rule held to violate Government Code section 11347.5).

26. These operations plans are authorized in a duly-adopted regulation. Title 15, CCR, section 3380, subsection (c), specifically provides:

> "Subject to the approval of the Director of Corrections, wardens, superintendents and parole region administrators will establish such operational plans and procedures as are required by the director for implementation of regulations and as may otherwise be required for their respective operations. Such procedures will apply only to the inmates, parolees and personnel under the administrator." [Emphasis added.]

Section 242 ("Local Operational Procedures") of the Administrative Manual provides in part:

> "Each institution . . . shall operate in accordance with the departmental procedural manuals, and shall develop local policies and procedures consistent with departmental procedures and goals.
>
> "(a) Each institution . . . shall establish local procedures for all major program operations.
>
> ". . . .

"(b) Procedures shall be consistent with laws, rules, and departmental administrative policy . . . ." [Emphasis added.]

These sets of rules issued by individual wardens or superintendents are known variously as "local operational procedures," "operations plans," "institutional procedures," and other similar designations. (See Administrative Manual section 242(d).) We simply refer to these documents as "operations plans."

27. The Department's current review process of its manuals includes eliminating the duplicative material in the local "operations plans," while retaining in these plans material concerning unique local conditions.

28. AB 1270 (Sieroty/1971).

29. SB 1088 (Nejedly/1973).

30. American Friends Service Committee v. Procunier (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.

31. All three bills also concerned the Adult Authority (now the Board of Prison Terms). We will not discuss that facet of the legislation.

32. AB 1282 (Sieroty/1975).

33. Section 3 of Statutes of 1975, chapter 1160, page 2876.

34. See In re Allison (1967) 66 Cal.2d 294, 292, 57 Cal.Rptr. 593, 597-98 (rules prescribed by Director include "D2601," Rules of the Warden, San Quentin State Prison include "Q2601"); In re Harrell (1970) 2 Cal.3d 675, 698, n.23, 87 Cal.Rptr. 504, 518, n.23 ("Director's Rule" supplemented by "local regulation"--Folsom Warden's Rule F 2402); In re Boag (1973) 35 Cal.App.3d 866, 870, n. 1, 111 Cal.Rptr. 226, 227, n. 1 (contrasts "local" with "departmental" rules). See also Department of Corrections, 20 Ops.Cal.Atty.Gen. 259 (1952) ("the rules and regulations of the Department of Corrections and of the particular institution. . . ." Emphasis added.)

35. (1973) 33 Cal.App.3d 252, 109 Cal.Rptr. 22.

36. Id., 33 Cal.App.3d at 258, 109 Cal.Rptr. at 25.

37. 720 F.2d at pp. 1135-36, n. 2.

38. 1987 OAL Determination No. 3 (Department of Corrections, March 4, 1987, Docket No. 86-009), California Administrative Notice Register 87, No. 12-Z, March 20, 1987, p. B-82; typewritten version, p. 11 (how inmates are classified); 1988 OAL Determination No. 6 (Department of Corrections, April 27, 1988, Docket No. 87-012), California Regulatory Notice Register 88, No. 20-Z, May 13, 1988, pp. 1685-1686; typewritten version, pp. 4-5 (internal administrative grievance procedure).

39. We recognize that the local rule banning installment contracts (at issue in 1988 OAL Determination No. 13, Docket No. 87-019), implicates the public interest in inmate rehabilitation, in that the Requester was attempting to enroll in an accounting course on the installment plan. We also recognized that there appeared to be nothing "unique" to CMF indicating that such a rule was needed there, rather than statewide. These considerations, however, were not deemed sufficient to change our disposition of that matter.

40. 393 U.S. 483, 89 S.Ct. 747 (1969).

41. Johnson v. Avery is cited as the "Reference" source for Title 15, CCR, section 3163.

42. Director's Rule D 2602, at that time, provided in part "No inmate shall assist or receive assistance from another in the preparation of legal documents. Any brief or petition not pertaining to his own case found in the possession of an inmate shall be confiscated."

43. (1970) 2 Cal.3d 675, 87 Cal.Rptr. 504.

44. Id., 2 Cal.3d at p. 688, 87 Cal.Rptr. at p. 511.

45. California Administrative Notice Register 76, No. 19-Z, May 8, 1976, p. 401.

46. 886 F.2d 1166 (9th Cir. 1989).

47. 430 U.S. 817, 97 S.Ct. 1491, 52 L.Ed.2d 72 (1977).

48. Sands v. Lewis 886 F.2d at 1168 (9th Cir. 1989).

49. The Sands court also cited Storseth v. Spellman, 654 F.2d 1349 (9th Cir. 1981) (state has an affirmative duty to provide constitutionally adequate access and bears the burden of demonstrating the adequacy of the chosen method).

50. California Regulatory Notice Register 90, No. 3-Z, January 19, 1990, p. 123.

51. On page two of the its Response, the Department states "The Memorandum also provides a rationale for Avenal's local rule. Limiting the amount of legal material going in and out of the unit containing the law library expedites the required searching for contraband."

52. Upon reviewing the Request and the Department's Response, it is our understanding that "processed through work exchange" means merely that there is some sort of "check point" which the inmate must pass through in order to get from one place to another in the prison. The inmate is examined or searched at this "check point" to ensure that he is not carrying contraband.

53. See Faulkner v. California Toll Bridge Authority (1953) 40 Cal.2d 317, 324 (point 1); Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 174 Cal.Rptr. 744 (points 1 and 2); and cases cited in note 2 of 1986 OAL Determination No. 1. A complete reference to this earlier Determination may be found in note 2 to today's Determination.

54. Government Code section 11342, subdivision (a). See Government Code sections 11343, 11346 and 11347.5. See also Auto and Trailer Parks, 27 Ops.Cal.Atty.Gen. 56, 59 (1956). For a complete discussion of the rationale for the "APA applies to all agencies" principle, see 1989 OAL Determination No. 4 (San Francisco Regional Water Quality Control Board and the State Water Resources Control Board, March 29, 1989, Docket No. 88-006), California Regulatory Notice Register 89, No. 16-Z, April 21, 1989, pp. 1026, 1051-1062; typewritten version, pp. 117-128.

55. See Winzler & Kelly v. Department of Industrial Relations (1981) 121 Cal.App.3d 120, 126-128, 174 Cal.Rptr. 744, 746-747 (unless "expressly" or "specifically" exempted, all state agencies not in legislative or judicial branch must comply with rulemaking part of APA when engaged in quasi-legislative activities); Poschman v. Dumke (1973) 31 Cal.App.3d 932, 943, 107 Cal.Rptr. 596, 603.

56. Roth v. Department of Veteran Affairs (1980) 110 Cal.App.3d 622, 167 Cal.Rptr. 552.

57. (Department of Corrections, August 31, 1988, Docket No. 87-019), California Regulatory Notice Register 88, No. 38-Z, September 16, 1988, p. 2944.

58. 137 Cal.App.3d 736, 737.

59. Stoneham v. Rushen I (1982) 137 Cal.App.3d 729, 735, 188 Cal.Rptr. 130, 135; Stoneham v. Rushen II (1984) 156 Cal.App.3d 302, 309, 203 Cal.Rptr. 20, 24; Faunce v. Denton (1985) 167 Cal.App.3d 191, 196, 213 Cal.Rprt. 122, 125.

60. Stoneham I also stated that "such uniform substantive proposals contained in administrative bulletins designed to implement the classification system must be promulgated in compliance with the [APA]." (Emphasis added.) 137 Cal.App.3d at 738, 188 Cal.Rptr. at 136.

61. Hillery, Stoneham II, and Faunce. See notes 19 and 20, supra.

62. According to Procunier, cited supra in note 30, 33 Cal.App.3d at pp. 261-262, 109 Cal.Rptr. at p. 28, the basic purposes of the APA are to:

> "provide in the context of a multi-agency control and supervision over widely varied business and professional enterprises and activities a standard and uniform procedure whereby those affected by the controls may be heard; and second, to provide a repository accessible to the public in which general administrative rules and regulations may be found, thus avoiding secrecy."

Though Procunier was largely overturned by the 1975 amendment to Penal Code section 5058, the case may be deemed to have some continuing vitality in context of institutional rules. That is, there is no evidence that the Legislature intended that those most directly affected by "local" prison rules were

to be consulted prior to the adoption of such rules. Further, since the institutional rules are made available to inmates, there is no "secrecy" problem.

The Lackner court (case cited in note 14, supra) stated that the two primary APA goals were meaningful public participation and effective judicial review. We conclude that affording prisoners the opportunity to comment on statewide rules adequately satisfies the public participation goal, and that it would be unduly burdensome to require elaborate documentation in the form of a rulemaking record for local rules. Wardens should be encouraged to set clear guidelines, not impeded from doing so.

63. According to the California Attorney General, the Legislature intended "to confer self-governing, quasi-independent status [on] the prisons and correctional institutions, and the wardens and superintendents of those facilities are granted powers akin to those granted local governments. See [Prison Warden Has Power to Establish Reasonable Visiting Hours Which Become Binding Upon Attorneys As Well As Upon Other Visitors,] 7 Ops.Cal.Atty.Gen. 15 (1946); Penal Code sec. 2086." Command Responsibilities at Correctional Institutions, 55 Ops.Cal.Atty.Gen. 169, 170 (1972).

64. In re French (1980) 106 Cal.App.3d 77, 164 Cal.Rptr. 800 (local practice inconsistent with CCR provision).

65. 1988 OAL Determination No. 13 (Department of Corrections, August 31, 1988, Docket No. 87-019), California Regulatory Notice Register 88, No. 38-Z, September 16, 1988, p. 2944, 2960-61; typewritten version, pp. 17-18.

66. All notes in the quotation are original; they have been renumbered for inclusion in this Determination.

67. Department's Response, p. 1.

68. We wish to acknowledge the substantial contribution of Unit Legal Assistant Melvin Fong and Senior Legal Typist Tande' Montez in the processing of this Request and in the preparation of this Determination.